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**SEP 05 2006**

**OFFICE OF PETITIONS**

Blair Nicole MacKenzie  
2314 Grinstead Drive, # 2  
Louisville KY 40204

In re Application of  
MacKenzie, et al.  
Application No. 10/609,350  
Filed: June 30, 2003  
Attorney Docket No.

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**ON PETITION**

This is a decision on the petition under 37 CFR 1.181 filed on December 7, 2004, to withdraw the holding of abandonment in the above-cited application.

The petition is **DISMISSED**.

The above-identified application became abandoned for failure to reply to the non-final Office action mailed April 2, 2004, which set a shortened statutory period for reply of three-months from its mailing date. No response was received within the allowable period, and the application became abandoned on July 3, 2004. A Notice of Abandonment was mailed on November 15, 2004.

Petitioner argues that a reply to the non-final Office action was mailed on June 14, 2004. Petitioner has provided a copy of the United States Postal Service, Certificate of Mailing showing a date-stamp of June 14, 2004.

The certificate of mailing that is utilized by the Postal Service does not satisfy the purposes of the certificate of mailing procedures under 37 CFR 1.8. As a point of reference, the full text of Section 1.8(a) of Title 37 of the Code of Federal Regulations states:

§ **Certificate of mailing or transmission**

(a) Except in the cases enumerated in paragraph (a)(2) of this section, correspondence Required to be filed in the Patent and Trademark Office within a set period of time will Be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

- (i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:
  - (A) Addressed as set out in 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or
  - (B) Transmitted by facsimile to the Patent and Trademark Office in accordance with 1.6(d); and

- (ii) The correspondence includes a certificate of mailing for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have a reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

A copy of an example of a certificate of mailing that would be recognized by the Patent and Trademark Office is attached. Petitioner must understand that the attached certificate of mailing is differs from the U.S. Postal Service certificate of mailing because the certificate of mailing under 37 CFR 1.8 is attached to the correspondence mailed or, in some cases, the wording is actually put on the communication mailed to the Patent and Trademark Office. If the communication were lost in the mail, petitioner would then be able to provide a copy of the communication along with the certificate of mailing that was attached to it and substantiate petitioner's claim that a response was timely filed to the Office action. It is impossible to tell what was in the envelope that had the certificate of mailing on it from the United States Postal Service. It could have been any number of communications filed by petitioner, therefore; the certificate of mailing from the United States Postal Service alone is not sufficient to establish that a response to the last Office action was timely mailed.

There are several ways to ensure that the Office receives correspondence and to establish that correspondence was received if the Office claims it was not. Petitioner may use the certificate of mailing procedures, the Express Mail procedures under 37 CFR 1.10, or an itemized postcard listing the contents of the envelope that will be date-stamped by the Office and returned to petitioner if the communication is received. Petitioner is charged with the having knowledge of all the rules and statutes governing the patent prosecution process. While it is regrettable that petitioner was not aware of the possibility of using a postcard to establish receipt of an Office communication, the lack of knowledge does not alleviate the burden of petitioner to file a timely response and file it in such a way that if it is lost petitioner is able to establish that it was timely mailed in accordance with the Code of Federal Regulations.

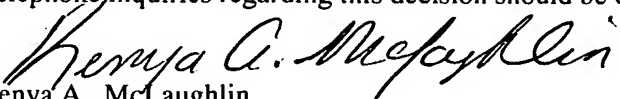
Based on the aforementioned, the petition under 37 CFR 1.181 to withdraw the holding of abandonment is dismissed. Petitioner may revive the application based on unintentional abandonment under 37 CFR 1.137(b) (enclosed). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by the required reply, the required petition fee (\$1,500.00 for a large entity and \$750.00 for a verified small entity), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents  
United States Patent and Trademark Office  
Box 1450  
Alexandria, VA 22313-1450

By facsimile: (571) 273-8300  
Attn: Office of Petitions

Telephone inquiries regarding this decision should be directed to the undersigned (571) 272-3222.

  
Kenya A. McLaughlin  
Petitions Attorney  
Office of Petitions

Enclosures: "Certificate of Mailing Under 37 CFR 1.8"  
"Petition for Revival of an Application for Patent Abandoned  
Unintentionally Under 37 CFR 1.137(b)" Form PTO/SB/64

**PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT  
ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)**

Docket Number (Optional)

First named inventor:

Application No.:

Art Unit:

Filed:

Examiner:

Title:

Attention: Office of Petitions

**Mail Stop Petition**

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

FAX (571) 273-8300

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.

The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the office notice or action plus an extensions of time actually obtained.

**APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION**

NOTE: A grantable petition requires the following items:

- (1) Petition fee;
- (2) Reply and/or issue fee;
- (3) Terminal disclaimer with disclaimer fee - required for all utility and plant applications filed before June 8, 1995; and for all design applications; and
- (4) Statement that the entire delay was unintentional.

**1. Petition fee**

☐ Small entity-fee \$ \_\_\_\_\_ (37 CFR 1.17(m)). Applicant claims small entity status. See 37 CFR 1.27.

☐ Other than small entity - fee \$ \_\_\_\_\_ (37 CFR 1.17(m))

**2. Reply and/or fee**

A. The reply and/or fee to the above-noted Office action in the form of \_\_\_\_\_ (identify type of reply):

- ☐ has been filed previously on \_\_\_\_\_.
- ☐ is enclosed herewith.

B. The issue fee and publication fee (if applicable) of \$ \_\_\_\_\_.

- ☐ has been paid previously on \_\_\_\_\_.
- ☐ is enclosed herewith.

[Page 1 of 2]

This collection of information is required by 37 CFR 1.137(b). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1.0 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

**3. Terminal disclaimer with disclaimer fee**☐ Since this utility/plant application was filed on or after June 8, 1995, no terminal disclaimer is required.☐ A terminal disclaimer (and disclaimer fee (37 CFR 1.20(d)) of \$ \_\_\_\_\_ for a small entity or \$ \_\_\_\_\_ for other than a small entity) disclaiming the required period of time is enclosed herewith (see PTO/SB/63).

- 4. STATEMENT:** The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional. [NOTE: The United States Patent and Trademark Office may require additional information if there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137(b) was unintentional (MPEP 711.03(c), subsections (III)(C) and (D)).]

**WARNING:**

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application) or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

\_\_\_\_\_  
Signature\_\_\_\_\_  
Date\_\_\_\_\_  
Typed or printed name\_\_\_\_\_  
Registration Number, if applicable\_\_\_\_\_  
Address\_\_\_\_\_  
Telephone Number\_\_\_\_\_  
AddressEnclosures: ☐ Fee Payment☐ Reply☐ Terminal Disclaimer Form☐ Additional sheets containing statements establishing unintentional delay☐ Other: \_\_\_\_\_**CERTIFICATE OF MAILING OR TRANSMISSION [37 CFR 1.8(a)]**

I hereby certify that this correspondence is being:

☐ Deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petition, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450.☐ Transmitted by facsimile on the date shown below to the United States Patent and Trademark Office as (571) 273-8300.\_\_\_\_\_  
Date\_\_\_\_\_  
Signature\_\_\_\_\_  
Typed or printed name of person signing certificate

## Privacy Act Statement

The **Privacy Act of 1974 (P.L. 93-579)** requires that you be given certain information in connection with your submission of the attached form related to a patent application or patent. Accordingly, pursuant to the requirements of the Act, please be advised that: (1) the general authority for the collection of this information is 35 U.S.C. 2(b)(2); (2) furnishing of the information solicited is voluntary; and (3) the principal purpose for which the information is used by the U.S. Patent and Trademark Office is to process and/or examine your submission related to a patent application or patent. If you do not furnish the requested information, the U.S. Patent and Trademark Office may not be able to process and/or examine your submission, which may result in termination of proceedings or abandonment of the application or expiration of the patent.

The information provided by you in this form will be subject to the following routine uses:

1. The information on this form will be treated confidentially to the extent allowed under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a). Records from this system of records may be disclosed to the Department of Justice to determine whether disclosure of these records is required by the Freedom of Information Act.
2. A record from this system of records may be disclosed, as a routine use, in the course of presenting evidence to a court, magistrate, or administrative tribunal, including disclosures to opposing counsel in the course of settlement negotiations.
3. A record in this system of records may be disclosed, as a routine use, to a Member of Congress submitting a request involving an individual, to whom the record pertains, when the individual has requested assistance from the Member with respect to the subject matter of the record.
4. A record in this system of records may be disclosed, as a routine use, to a contractor of the Agency having need for the information in order to perform a contract. Recipients of information shall be required to comply with the requirements of the Privacy Act of 1974, as amended, pursuant to 5 U.S.C. 552a(m).
5. A record related to an International Application filed under the Patent Cooperation Treaty in this system of records may be disclosed, as a routine use, to the International Bureau of the World Intellectual Property Organization, pursuant to the Patent Cooperation Treaty.
6. A record in this system of records may be disclosed, as a routine use, to another federal agency for purposes of National Security review (35 U.S.C. 181) and for review pursuant to the Atomic Energy Act (42 U.S.C. 218(c)).
7. A record from this system of records may be disclosed, as a routine use, to the Administrator, General Services, or his/her designee, during an inspection of records conducted by GSA as part of that agency's responsibility to recommend improvements in records management practices and programs, under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall be made in accordance with the GSA regulations governing inspection of records for this purpose, and any other relevant (*i.e.*, GSA or Commerce) directive. Such disclosure shall not be used to make determinations about individuals.
8. A record from this system of records may be disclosed, as a routine use, to the public after either publication of the application pursuant to 35 U.S.C. 122(b) or issuance of a patent pursuant to 35 U.S.C. 151. Further, a record may be disclosed, subject to the limitations of 37 CFR 1.14, as a routine use, to the public if the record was filed in an application which became abandoned or in which the proceedings were terminated and which application is referenced by either a published application, an application open to public inspection or an issued patent.
9. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local law enforcement agency, if the USPTO becomes aware of a violation or potential violation of law or regulation.

## Certificate of Mailing under 37 CFR 1.8

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to:

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on \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Typed or printed name of person signing Certificate

\_\_\_\_\_  
Registration Number, if applicable

\_\_\_\_\_  
Telephone Number

Note: Each paper must have its own certificate of mailing, or this certificate must identify each submitted paper.

This collection of information is required by 37 CFR 1.8. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1.8 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. **SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.**

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